SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1101

GLOBE INDEMNITY COMPANY,
Petitioner,

vs.

JAMES R. WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Globe Indemnity Company hereby petitions this Court to grant it a Writ of Certiorari to review the judgment of the Court of Appeals for the Eighth Circuit, decided October 30, 1974, Rehearing and Rehearing En Banc denied December 5, 1974, in this cause. In support of its petition, it respectfully shows:

OPINIONS BELOW

The opinion of the District Court for the Western District of Arkansas, El Dorado Division, in Globe Indemnity Company (GLOBE) v. James R. Williams (WILLIAMS), Civil Action No.

ED-73-C-30, is not reported. A true copy of the Order of the Court entered in favor of GLOBE is appended hereto as Appendix A. The opinion of the United States Court of Appeals for the Eighth Circuit in WILLIAMS, Appellant v. GLOBE, Appellee, Cause No. 74-1287, reversing the District Court, is reported at 507 F.2d 837. A true copy of that opinion is appended hereto as Appendix B.

JURISDICTION

WILLIAMS, the defendant below, appealed this case to the Court of Appeals for the Eighth Circuit from an Order of the District Court granting a Motion for Summay Judgment to GLOBE. It is the decision of the Eighth Circuit, reversing the District Court's summary judgment in favor of GLOBE which is sought to be reviewed here. This Petition is being filed within ninety (90) days of the entry of such judgment of December 5, 1974 pursuant to 28 U.S.C.A., Section 2101(c). The jurisdiction of this Court to review the judgment and decision in this case by Writ of Certiorari is conferred by 28 U.S.C.A., Section 1254(1).

QUESTION PRESENTED FOR REVIEW

The litigation here begun by GLOBE is under the Arkansas Insurance Code 66-2406 at section (1) which makes "Fidelity insurance" one of the three categories of "Surety insurance". The question involves whether the "sixth" or the "fourth" of the six sections of the three year limitation Arkansas Statute, 37-206, shall apply to a suit by petitioner, GLOBE, under its "Fidelity insurance" filed June 7, 1973, against respondent, WILLIAMS, for a payment of $44,475.56 made by GLOBE to Monsanto Company (MONSANTO) on August 31, 1970, by reason of embezzlements by WILLIAMS while employed at

MONSANTO which were discovered by MONSANTO not later than March 12, 1970.

Can the Eighth Circuit disregard the application of Section 66-2406 of the Arkansas Insurance Statute which distinguishes between "Fidelity insurance" with its three party surety characteristics as against two party insurance policies between an insurer and an insured, or between ordinary contracts, or disputes which do not have the characteristics of a surety arrangement? The three year Arkansas Statute of Limitations, Section 37-206, which states the six types of actions that shall be commenced within three (3) years after the cause of action accrues presents a different yardstick for the application of the three years when the "fourth" section which states "all actions founded on any contract or liability, express or implied," is used instead of the "sixth" section which states "actions for taking or injuring any goods or chattels", in the context of Section 66-2406.

WILLIAMS contends that the "sixth" section applies which runs the statute from March 12, 1970 and makes the suit filed June 7, 1973 untimely. GLOBE contends that the "fourth" section applies which extends the three year statute from August 31, 1970, the date of payment, and thus make the suit timely. Further, that in any event the action did not accrue as to GLOBE until the date of payment, August 31, 1970.

The question has substantial significance under *Erie Railroad Company v. Tompkins, et al.*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, because the Arkansas Statute 66-2406 making "Fidelity insurance" the same as "Surety insurance" was not considered or applied by the Eighth Circuit in deciding the case on the "sixth" section, rather than the "fourth" section, of 37-206.

STATUTES INVOLVED

Arkansas Statutes, 1947, 1962 Replacement, vol. 3B, 37-206

37-206. Actions which must be brought in three years —Contracts not in writing—Rent—Trespass—Libel—Injury to goods.—The following actions shall be commenced within three [3] years after the passage of this act, or, when the cause of action shall not have accrued at the taking effect of this act, within three [3] years after the cause of action shall accrue; First, all actions (of debt) founded upon any contract, obligation, or liability, (not under seal [and not in writing],) excepting such as are brought upon the judgment or decree of some court of record of the United States, of this, or some other State; (second, all actions upon judgments rendered in any court not being a court of record;) third, all actions for arrearages of rent (not reserved by some instrument in writing, under seal;) fourth, all actions (of account, assumpsit, or on the case,) founded on any contract or liability, expressed or implied; fifth, all actions for trespass on lands, or for libels; sixth, all actions for taking or injuring any goods or chattels. [Rev. Stat., ch. 91, § 6; C. & M. Dig., § 6950; Pope's Dig., § 8928.]

Compiler's Notes

This section in so far as it may have applied to contracts in writing is superseded by § 37-209 and, therefore, the bracketed words "and not in writing" were inserted in brackets by the compiler. The "second" clause has been enclosed in parentheses by the compiler as superseded by §§ 26-1101, 37-212. The type of actions (as debt, account, assumpsit and case), in the "first" and "fourth" clauses would seem to be obsolete because of the abolition of forms of action under § 27-201, and such words have been enclosed in parentheses by the compiler. The words "not under seal" and "not reserved by some instrument in writing, under seal" appeared in parentheses in the act.

"This act" referred to in this section is ch. 91 of the Revised Statutes, the effective provisions of which are compiled as §§ 37-105, 37-108, 37-109, 37-201—37-204, 37-206, 37-213—37-225, 37-229, 37-232, 37-233, 38-103.

Arkansas Statutes, 1947, 1966 Replacement, vol. 6. 66-2406

66-2406. "Surety insurance" defined.—Surety insurance includes:

(1) Fidelity insurance, which is insurance guaranteeing the fidelity of persons holding positions of public or private trust.

(2) Insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship.

(3) Insurance indemnifying banks, bankers, brokers, financial or money corporations or associations against loss, resulting from any cause, of bills of exchange, notes, bonds, securities, evidence of debt, deeds, mortgages, warehouse receipts or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, including any loss while the same are being transported in armored motor vehicles, or by messenger, but not including any other risks of transportation or navigation; also insurance against loss or damage to such an insured's premises or to his furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat. [Acts 1959, No. 148, § 77, p. 418.]

STATEMENT OF THE CASE

WILLIAMS, while an employee of MONSANTO in Arkansas in 1970 and in prior years embezzled money of MONSANTO. The embezzlement was discovered by MONSANTO not later than March 12, 1970, on which date WILLIAMS made a detailed statement of his various acts of embezzlement.

A claim was then made by MONSANTO against GLOBE under a Blanket Crime Policy dated April 24, 1965 which included "Employee Dishonesty Coverage" guaranteeing the fidelity of MONSANTO employees. On August 31, 1970 GLOBE paid MONSANTO $44,475.56, representing the total amount of the ascertained loss less a $5,000.00 deductible.

GLOBE filed suit against WILLIAMS for the $44,475.56 on June 7, 1973 in the El Dorado Division of the District Court for the Western District of Arkansas. Cross-motions for summary judgment were filed.

The District Court gave judgment for GLOBE. WILLIAMS appealed. The Eighth Circuit reversed the trial court. GLOBE sought a rehearing which the Appeals Court denied on December 5, 1974. Hence this Petition for Certiorari.

ARGUMENT

Here, the question under Supreme Court Rule 19(b), is whether the Eighth Circuit's decision is in conflict with the law of the State of Arkansas when it disregards Section 66-2406, enacted in 1959. The construction and effect of Section 66-2406 is to define "Fidelity insurance" as one of three categories of "Surety insurance."

It is for this reason this Court is being asked to grant a writ of certiorari to resolve a conflict in the application of the "fourth" and the "sixth" sections of the three year Arkansas Statute of Limitations, Section 37-206, as either the "fourth" or the "sixth" will apply to this case involving, as it does, the rights of the GLOBE as an underwriter of "Surety insurance" as defined by Section 66-2406.

The Effect of Erie v. Tompkins: *Erie Railroad Company, Petitioner v. Tompkins,* 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 1194, held:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Where the construction and effect of an Arkansas State Statute is concerned, the Eighth Circuit has no discretion other than to give effect to 66-2406 as it is enacted in Arkansas. The fact that the Supreme Court of Arkansas has not passed directly upon a case with the facts here involved is not a matter of concern in the face of Section 66-2406. Section 66-2406 should be read into this case, and GLOBE is entitled to its application as a fidelity insurer writing "Surety insurance."

The Cases Cited in the Eighth Circuit's Opinion: Not one of the nine cases cited by the Court of Appeals involved a case of "Fidelity insurance" which by Section 66-2406 Arkansas legislated in 1959 to be "Surety insurance" with its resulting three party relationship and right of indemnity. The reasoning of the Appeals Court in deciding the case, which petitioner respectfully submits is erroneous, is apparent from these cases cited by the Appeals Court in its decision, all of which involve either a two party agreement or dispute or a two party insurance policy. The cases involve:

1. An action by a lessor of an aircraft against an officer of a dissolved corporate lessee to recover rentals due under a lease (Air Leases, Inc.);

2. An action to recover possession of a mule where the plaintiff introduced testimony tending to show that the defendants' possession was wrongful (Conditt);

3. A case involving a common-law action for fraud and deceit and for violations of the Securities Act and Rule 10b-5 (Vanderboom);

4. An action by Wrinkles against Brown to recover $600.00 when Brown was sheriff (Wrinkles);

5. An action by Williams against Metropolitan to recover on life policies (Metropolitan);

6. An action which combined two actions by partners against a third partner to recover items alleged to be fraudulently withheld in settling the partnership (Wright);

7. An action by Watts against Ogden which involved a mortgage and a note (Ogden);

8. An action involving a claim by an insurance company after payment to an insured under an uninsured motorist provision against an uninsured motorist (American States); and,

9. An action by an uninsured motorist insurer to enjoin the defendant from asserting the Statute of Limitations as a defense in the insurer's action as subrogee (Insurance Company of North America).

The point to the above summary is that the cases relied on by the Eighth Circuit did not involve the three party relationship present in the case before this Court involving what Arkansas calls "Surety insurance."

The Basis of Globe's Right Is the Fact of Payment: Petitioner respectfully submits that when Arkansas legislated "Fidelity insurance" into the "Surety insurance" family it immediately came under the landmark case of *Griffin v. Long, et al.*, 1910, 96 Ark. 268, 131 S.W. 672, which holds that the right of the surety relates back to the date of the bond, called "Surety insurance." *Griffin* held that:

> "When one becomes surety for a principal, a liability arises upon the part of the principal to indemnify his surety for any payment which he may be compelled to make for the principal. (citations) The principal thus becomes indebted to the surety for the payments he is compelled to make for the former, and the question which arises is: Does such indebtedness have its inception from the time the party became surety, or from the time payment is made by the surety? The true rule seems to be that the surety becomes a creditor of the principal at the time he signs the note as surety, and not at the time he pays the same."

The point was next raised in *McDonald v. Mueller*, 1916, 123 Ark. 226, 183 S.W. 751, when that court followed *Griffin* in holding that:

> "(p. 753) The question involved here is not merely the time when a surety may sue his principal, for in such

> case the statute of limitations does not run as against the surety until he has paid the debt, * * * In the ordinary relation between principal and surety there is an implied contract of indemnity, which is not breached until the surety has been called upon to make good the default of his principal, and this was the action which appellant set up in his crosscomplaint in the original suit by the payee of the notes against him and appellee, and the period of limitation against that action is three years."

The issue in *Griffin* was next followed in *United States Fidelity & Guaranty Co. v. Maxwell, Bank Com'r.*, 1922, 152 Ark. 60, 237 S.W. 708, 713, where the Arkansas court quoted *Griffin* and also the following:

> "(712) In 25 R.C.L. p. 1328, it is said:
>
> "This right of a surety to subrogation stands upon the principles of natural justice. Payment by the surety is deemed equivalent to a purchase from the creditor, and operates as an equitable assignment of the debt, and all its incidents, to the former. It has well been said that in these cases the law creates or implies a contract on the part of the creditor that such (p. 713) property or securities will be turned over to the one who is secondarily liable as soon as he pays the creditor's claim. The right of a surety to subrogation begins with the contract of suretyship, and is not simply inchoate until he pays the debt."

It should be remembered that the "Fidelity insurance" involved here was executed by GLOBE for MONSANTO on April 24, 1965 (Cf. Statement of the Case, supra).

The closest case out of Arkansas that extensive research has developed is *Madison County Farmers Association v. American Employers Ins. Co.*, 1954, 8th Cir., 209 F.2d 581 (af-

firming 112 F.Supp. 753), where in construing a contract to indemnify an employer for his employee's infidelity the Appeals Court pronounced the law of Arkansas when it said at page 584:

> "[1] The applicable law is well stated in the article on suretyship in Volume 50, Am.Jur., Section 313, at page 1108, reading in part as follows:
>
> > 'While it is a rule that the courts, in construing an ambiguous provision in a compensated surety contract, apply the rules applicable to insurance contracts, and while insurance contracts are in many respects similar to surety company contracts, yet, it is said, there is a wide difference between the two contracts. Insurance has been defined as a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event; whereas a contract of suretyship is one to answer for the debt, default or miscarriage of another, and the nature of the contract is not altered because made by a corporation for compensation. The contract creates a tripartite relation between the party secured, the principal obligor, and the surety, and the rights, remedies and defenses of a surety cannot be disassociated from this relationship although the contract is called one of insurance. * * *'
>
> This pronouncement expresses, we think, in principle the law of Arkansas."

All the above cases are Arkansas cases; all involved suretyship; and, all were decided before 1959 when section 66-2406 became an Arkansas Statute.

Collateral Cases Not Involving "Surety insurance": In *Fidelity and Casualty Company of New York v. Jones Construction*

Company, 1961, DCEDArk., 200 F.Supp. 264, which was a diversity indemnity action by insurers subrogated to rights of architects who had been held liable for injuries suffered by a construction contractor's employees when an excavation wall caved in that court held:

> "(p. 266) As to the action being barred by statutes of limitation or by laches, it may be noted that normally the statute of limitations runs in favor of the principal obligor, where indemnity is owed, from the time when payment of the obligation is made. Restatement, Restitution sec. 77 (1937)."

In *Ark-Homa Foods, Inc. v. Ward, et al.*, 1971, 473 S.W.2d 910, decided by the Supreme Court of Arkansas, which involved an action to recover for losses to insured goods, that court ended up its decision with the following paragraph:

> "The attempt to substitute another party or parties for Ark-Homa Foods was more than three years after the insurers paid the losses. There is no doubt but that the three year statute of limitations had run. Ark. Stat.Ann. Sec. 37-206 (Repl.1962)."

The above cases support Petitioner's submission that the Appeals Court was in error in its holding (p. 840) "that Globe had no separate right to indemnification on the facts of this case".

CONCLUSION

GLOBE respectfully submits that in Arkansas, by statute since 1959 and both before and after 1959 by case law, "Fidelity insurance" is suretyship with its three party interrelationships and obligations and rights. Section 66-2406 should be given the meaning which the Arkansas Legislature, in 1959, meant "Fidelity insurance" to have. There is the difference be-

tween night and day in the difference between "Fidelity insurance" and the other types and kinds of insurance policies, whether automobile, casualty, or whatever.

GLOBE, just as every insurer, can never be certain when the date is that a purchaser of its coverage, whether called a policy, or a bond, or a contract of insurance, first discovers it has sustained a loss by reason of the infidelity of its employees holding positions of trust.

All the GLOBE can know with certainty is the date of its payment on the loss. It is this date, August 31, 1970, that should control the application of the limitations statute 37-206 at section "four" in this case. And WILLIAMS, the former employee of MONSANTO, was obligated to GLOBE the same as any principal under any contract of a surety.

This is an important state question which has been decided by the Appeals Court in a way in conflict with the Arkansas Statute, and also Petitioner submits, under the Arkansas case law. The result of the Appeals Court decision will be substantial and never ending confusion, not only for GLOBE, but for every insurance company. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted

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